

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 AUG 16 P 2:14

PoliticsOnline

Internet tools for politics

<http://www.politicsonline.com>email: pol@politicsonline.com

Bradley Litchfield, Esq.
Associate General Counsel for Policy
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Comment to
AOR 2002-09

Re: Target Wireless' Advisory Opinion Request

Dear Mr. Litchfield,

I am writing in support of Target Wireless's request for an advisory opinion (AOR 02-09) that would allow political advertising via SMS technology on digital cellular telephones to be exempted from the disclaimer requirement of political advertising.

PoliticsOnline is an online fundraising and total e-commerce solution for campaigns. As such, we are in a position to see how useful and important political advertising using SMS technology on digital phones is and will become. One of our recent online articles discusses how the government wants to use SMS technology to allow the public to make appointments with state-run organizations such as hospitals, and to issue warnings of potential disasters such as flash floods. We believe that as SMS technology becomes more popular political advertising via SMS technology could become a vital aspect of political advertising overall. People are using portable modems and technology to communicate more than ever and as expected, this will only increase in time. Advertising via SMS technology may be the only way to connect with some audiences. And, given the character limit of 160 characters, it would not be possible to include news content along with a political advertisement and be able to include a disclaimer within that character limit.

In our experience, we think that this would be an immensely valuable service. We strongly urge the Commission to allow political advertising via SMS technology without a disclaimer.

Sincerely,

Phil Noble

National Republican Senatorial Committee

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

ALEX N. VOGEL
GENERAL COUNSEL

VALERIE E. FRENCH
DEPUTY GENERAL COUNSEL

Comment to
AOR 2002-09

2002 AUG 19 P 4: 13

August 2, 2002

Aug 12 3 36 PM '02
RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Jonathan Levin
Senior Attorney
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Request of Advisory Opinion by Target Wireless

Dear Mr. Levin:

Pursuant to 11 CFR § 112.3(a), the National Republican Senatorial Committee respectfully submits comment on the request for advisory opinion by Target Wireless, endorsing the application of 2 U.S.C. § 441d and its exceptions at 11 C.F.R. § 110.11(a)(6) to the distribution of political advertising to subscribers of wireless digital phones through digital text messaging. Specifically, the NRSC requests the Commission issue an opinion stating that the disclaimer exception provided in 11 C.F.R. § 110.11(a)(6) for advertising on types of items, such as bumper stickers, skywriting, etc., apply to advertising on wireless digital telephones on grounds of impracticability.

As provided by 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(2), a communication that expressly advocates the election or defeat of a candidate through public political advertising must be accompanied by a clear and conspicuous disclaimer to give the reader notice of the identity of the party who paid for the communication. However, 11 C.F.R. § 110.11(a)(6) recognizes exceptions to the disclosure requirement for items where inclusion of a disclaimer with the advertisement would prove impracticable due to the relative size of the disclaimer to the advertisement.

When advertising through Target Wireless, short digital messages, with content related advertisements accompanying, are sent to those wireless subscribers who opt to receive such messages. Based on the average character capacity of one hundred sixty (160) characters for each textual message, messages are compressed into a limited amount of character space into which there is no room to place a disclaimer. Additionally, any single message may not be continued. Should a single content be sent through two "continuous," or related, messages, the subscriber will be billed for each of the messages. Also, since the two messages are sent separately, the messages may not

RONALD REAGAN REPUBLICAN CENTER
425 SECOND STREET, N.E. • WASHINGTON, D.C. 20002 • (202) 675-6000

PAID FOR AND AUTHORIZED BY THE NATIONAL REPUBLICAN SENATORIAL COMMITTEE

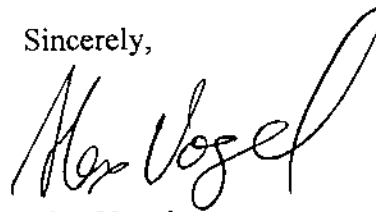
appear continuous in nature, as the subscriber may receive other messages between the two related messages.

By requiring disclaimers to be displayed with digital text advertisements, political candidates are effectively prevented from using this new media when creating advertising initiatives. Additionally, wireless providers and agencies are prevented from turning to an alternative client pool, political candidates, when seeking sponsorship for the services that they provide.

Given the size of the advertisement, limited space, and nature of advertising through digital text messaging, it is similar to the types of advertising excepted from disclaimers under 11 CFR § 110.11(a)(6). By finding that the disclaimer exceptions under § 110.11(a)(6) include digital text messaging advertising, a new media would be open to political candidates to effectively reach hard-to-reach mobile voters.

On the grounds of impracticability, the NRSC respectfully requests that the Commission issue an advisory opinion on the request of Target Wireless stating that digital text messaging advertising is exempt from the disclaimer requirement provided in 2 U.S.C. § 441d.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Vogel". The signature is fluid and cursive, with a large loop at the end of the last name.

Alex Vogel
General Counsel

CTIA

Cellular Telecommunications & Internet Association

RECEIVED
FEC MAIL ROOM

2002 AUG 19 P 12: 20

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

Michael F. Altschul

Senior Vice President for
Policy and Administration and
General Counsel

2002 AUG 19 P 4: 13

August 19, 2002

Bradley Litchfield, Esq.
Associate General Counsel for Policy
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Comment to
AOR 2002-09

AUG 19 1 20 PM '02

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Request of Target Wireless for an Exemption from the Disclosure Requirement of 2 U.S.C. § 441d

Dear Mr. Litchfield:

Pursuant to 11 C.F.R. § 112.3(a), the Cellular Telecommunications & Internet Association (CTIA)¹ supports the request by Target Wireless seeking an exemption of certain disclosure requirements under the disclaimer exception, 11 C.F.R. § 110.11(a)(6), for the distribution of political advertising to Commercial Mobile Radio Service ("CMRS") subscribers who have "opted-in" to receive such messages on their wireless devices using Short Message Service ("SMS"). Accordingly, CTIA urges the Federal Election Commission to issue an advisory opinion stating that the disclaimer exception logically applies to political advertising using SMS text messages.

As Target Wireless describes in its Request for an Advisory Opinion, CMRS SMS permits subscribers to send and receive short text messages using wireless devices. At present, each SMS message is limited to 160 characters.² Accordingly, the provisions of 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(1), which require, *inter alia*, that a communication advocating the election or defeat of a candidate through public political

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² While different wireless technologies and devices have different text messaging capabilities, all platforms support 160 character messages, making this the *de facto* SMS standard for text messages in the United States.



advertising must be accompanied by a clear and conspicuous disclaimer to give the reader notice of the identity of the party who paid for the communication, would be impractical considering the length of the mandated disclaimer. Fortunately, the Federal Election Commission's rules provide for an exception to the disclosure requirement for advertising where the disclosure would be impracticable due to the relative size of the disclaimer to the advertisement. *See* 11 C.F.R. § 110.11(a)(6).

In the Twentieth Century, the Commission applied this exception to skywriting, and advertising on small items, such as pens and pencils, where a disclaimer would be impractical. CTIA urges the Federal Election Commission to extend this exception to SMS text messages.³ Given the severe limitations on the length of SMS text messages, this Twenty-First Century wireless messaging technology is similar to the types of advertising previously excepted under 11 C.F.R. § 110.11(a)(6). Absent such a ruling, political candidates will not be able to take advantage of SMS to reach the 135 million Americans who subscribe to CMRS offerings.

As the Association of National Advertisers observed in its August 12, 2002, letter in support of the Target Wireless request, any effort by the government to restrict either political or commercial speech must be "narrowly tailored" to reasonably address a substantial government interest to satisfy significant First Amendment concerns. *See Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). With respect to political speech, the government must justify any restriction, including overly burdensome disclosure requirements that effectively can preclude certain forms of speech.

Because SMS text messaging comes within the scope of the disclaimer exception, and because overly burdensome disclosure requirements implicate important First Amendment considerations, CTIA supports the request by Target Wireless seeking an exemption of certain disclosure requirements under the disclaimer exception, 11 C.F.R. § 110.11(a)(6), for the distribution of political advertising to Commercial Mobile Radio Service ("CMRS") subscribers who have "opted-in" to receive such messages on their wireless devices using Short Message Service ("SMS"). Accordingly, CTIA urges the Federal Election Commission to issue an advisory opinion stating that the disclaimer exception logically applies to political advertising using SMS text messages.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Altschul", with a stylized flourish at the end.

Michael Altschul

³ Target suggests, in the alternative, that if the Commission does not fully except the disclosure requirement, it could limit the disclosure information to a phone number or Internet address where the recipient of the message could receive more information concerning the sponsor of the message.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: COMMISSION SECRETARY *MWD*

DATE: August 21, 2002

SUBJECT: COMMENT DRAFT AO 2002-09

Transmitted herewith is a timely submitted comment from Diana Hartstein, Attorney for Target Wireless, regarding the above-captioned matter.

Proposed Advisory Opinion 2002-09 is on the agenda for Thursday, August 22, 2002.

Attachment:

3 pages

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 AUG 21 A 11:11

Caplin & Drysdale
ATTORNEYS

Caplin & Drysdale, Chartered
One Thomas Circle, NW, Suite 1100
Washington, DC 20005
202-862-5000 202-429-3300 fax
www.caplindrysdale.com

202-862-5069 Direct
drh@capdale.com

August 21, 2002

Via Fax and Hand Delivery

Ruth Heilizer
Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Response to AO Draft Comment Procedures for AO 2002-09 (Target Wireless)

Dear Ms. Heilizer:

This letter is in response to the DRAFT ADVISORY OPINION 2002-09 ("Draft"). I understand that two drafts have been prepared in response to AOR 2002-09. Since DRAFT B supports Target Wireless' position, this letter responds to DRAFT A.

The authors of Draft A have failed to understand that a wireless telephone is a media receiver that will only be used as a receiver of political advertising when this advertising is attached to content (information, news, etc.) to which consumers subscribe. While it may be possible to offer political advertising exclusive of content, so as to accommodate the Commission's current disclosure requirements, the realistic opt-in subscription rate for a *political advertising only* SMS service will be so insignificant that this medium will be rendered useless to any Federal candidate wishing to reach more than a handful of voters.

The one distinguishing characteristic between SMS text messaging delivered to wireless telephones and radios, televisions, and newspapers is space. One-hundred and sixty characters is all that exists for SMS text messaging, 160 characters that must be sliced and diced to include content such as news and a candidate's communication, leaving virtually no room for any disclaimer whatsoever.

Draft A makes three arguments in opposition to Target Wireless' request whether political advertising via SMS technology on wireless digital telephones is analogous to other types of political advertising that are excepted from the disclaimer requirement in 11 CFR 110.11(a)(6)(i)-(ii). The reasons given in Draft A in finding that political advertising via SMS technology does not fall within the exceptions in 11 CFR 110.11(a)(6)(i)-(ii) suggests that there may be some confusion over the mechanics of political advertising via SMS technology.

First, the Draft explains that by virtue of their size, the "small" items listed in 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, etc., can only display short messages, which is why disclaimers "cannot be conveniently printed" on them. It incorrectly contrasts that with the size of telephone screens and states that "[t]he true limitation, *which Target imposes on itself*, is that it seeks to display content and the political advertisement on the same screen." (Emphasis added.) Target Wireless in no way whatsoever imposes this limitation on itself. In fact, it does not impose this limitation for two reasons: (1) the 160 character limitation is set by current technology and (2) the amount of characters that Target Wireless is allotted within the 160 characters is determined by the wireless carrier, e.g., Sprint PCS or content provider, e.g., CNN, FOX, etc. Thus, Target Wireless has no influence regarding the determination of the fraction of 160 characters that are available for political advertising within the 160 character limit.

Arguing that Target Wireless has control over the character limitation is analogous to arguing that political advertisers in a newspaper have control over the percentage of news to advertising that is published in a given issue. The newspaper sells advertising space, and an advertiser is not permitted to use more than the space allotted to it. Assuming otherwise would be to assume that the Washington Post could be a newspaper filled entirely with advertisements, if the advertisers, and not the newspaper had control over space allotment. Because this service is opt-in, giving consumers a choice to subscribe or not subscribe, the consumer must receive value beyond what is contained in a candidate's political advertising message. Otherwise, consumers would not sign up for the service if all they were receiving were political advertisements.

The second argument in the Draft also focuses on the fact that disclaimers with political advertisements are not "impracticable" within the 160 character limitation. Again, the number of characters that the carriers and content providers will bestow to political advertisers is not within the advertisers' control. Thus, it is incorrect to assume that political advertisers will be able to put forth their political advertisement and disclaimer within the small fraction of the 160 characters that the carriers, portals, and content providers will allot to political advertisers.

Finally, the Draft states that "unlike the excepted items which do not have space for disclaimers, Target's messages have space that is taken up with content." Let me reemphasize that neither the political advertisers nor Target Wireless will have control over what fraction of the 160 characters is taken up with content and political advertising.

Caplin & Drysdale
CHARTERED

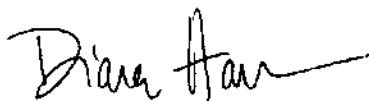
- 3 -

Additionally, only a consumer who opts-in/subscribes to receive content that is subsidized by political advertisements will receive them. Accordingly, there will not be an issue of "spam" that is, SMS messages will not be sent to consumers who do not subscribe to receive them in return for discounted or free content or news services.

Please see the letters from the Advertising Association of America, Cellular Telecommunications Industry Association, the National Republican Senatorial Committee, and the Association of National Advertisers, in our support who have noted, granting this form of political advertising will only enhance debate on issues and political speech by providing a cost efficient new media vehicle that is more accessible for all candidates and the electorate.

Thank you for your time and consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Diana Hartstein", with a long horizontal flourish extending to the right.

Diana Hartstein
Attorney for Target Wireless



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC RECORDS

FROM: COMMISSION SECRETARY *MWD*

DATE: August 21, 2002

SUBJECT: COMMENT DRAFT AO 2002-09

Transmitted herewith is a timely submitted comment from Brian G. Svoboda, Counsel to the DSCC, regarding the above-captioned matter.

Proposed Advisory Opinion 2002-09 is on the agenda for Thursday, August 22, 2002.

Attachment:

2 pages

PERKINS COIE LLP

607 FOURTEENTH STREET, N.W. - WASHINGTON, D.C. 20005-2011

TELEPHONE: 202 628-6600 • FACSIMILE: 202 434-1690

August 21, 2002

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

AUG 21 12 50 PM '02

Re: Advisory Opinion Request 2002-9

Dear Mr. Norton:

As counsel to the Democratic Senatorial Campaign Committee ("DSCC"), we are pleased to submit our views on Advisory Opinion Request 2000-9, and to urge approval of the proposed transaction.

The Commission has had many opportunities to apply the Federal Election Campaign Act, as amended, 2 U.S.C. § 431 *et seq.*, and its own regulations to emerging technologies that could not have been foreseen when the statutes and rules were written. In recent years, the Commission has removed barriers to the use of these technologies with great consistency. For example, in 1999, the Commission even quickly amended its regulations to allow Presidential campaigns to receive matching funds for contributions made by credit cards over the Internet. See *Matching Credit Card and Debit Card Contributions in Presidential Campaigns*, 64 Fed. Reg. 32,394 (1999); Advisory Opinion 1999-9.

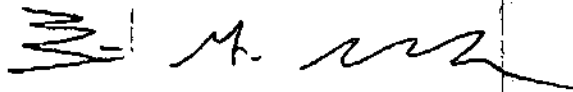
Here, the Commission may simply interpret the rules to permit the technology's effective use, something it has done several times before. Reasonable Commission interpretations have allowed volunteers to build candidate web sites on their personal computers, see Advisory Opinion 1999-17; corporations to use digital signatures in collecting PAC contributions from their restricted class, see Advisory Opinion 1999-3; and committees to receive funds by electronic check, see Advisory Opinion 1999-36.

[04005-0001/DA022320.039]

Lawrence Norton, Esq.
August 21, 2002
Page 2

Candidates, committees and the public have all benefited from these interpretations. They have the chance to do so again through this request, which the Commission should grant.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'M. Elias', followed by a long horizontal flourish.

Marc E. Elias
Brian G. Svoboda
Counsel to the DSCC

cc: Jonathan Levin, Esq.